UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CAREY CLAYTON	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 3:13-cv-219-JRS**
	)	
AARON'S, INC., et al.	)	
	)	
Defendants	)	
	)	

DEFENDANT AARON'S, INC.'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO ITS MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

Defendant Aaron's, Inc.'s ("Aaron's") Motion to Dismiss should be granted because Plaintiff failed to allege facts supporting the elements of his claims and showing those claims are at least plausible. Given his claims, not even with his belated assertion that he could say he orally revoked the authorization to Aaron's in the lease agreement (the "Agreement"), would he be able to state a cause of action under the Telephone Consumer Protection Act ("TCPA"), without which his emotional distress claim also has no basis. Therefore, Plaintiff cannot usefully amend the Complaint, and the Court should dismiss the Complaint with prejudice.

ARGUMENT

I. PLAINTIFF HAS NOT SUFFICIENTLY ALLEGED A CAUSE OF ACTION FOR RELIEF UNDER THE TCPA

Plaintiff, conceding that the claim for invasion of privacy must be dismissed, contends in Opposition to Aaron's Motion to Dismiss the remaining claims that at the pleading stage he has no obligation to allege particular facts because he is only providing Aaron's with notice of his claims. This is an argument meant to sidestep the abject failure to have alleged the requisite facts to support those claims. It is not Aaron's contention that Plaintiff failed to meet notice pleading requirements under Fed. R. Civ. P. 8. Aaron's assertion is that Plaintiff has failed to state a cause of action, which requires the court to look at the facts alleged and determine whether or not those facts are sufficient to plausibly support the legal claims. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (a complaint must state a claim to relief that is "plausible on its face"). Under this standard, it is clear that "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for *Rule 12(b)(6)* purposes." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

Not only does Plaintiff's Opposition not point to any facts in the Complaint supporting the elements of his causes of action, he virtually concedes that he has no facts. First as to the TCPA claim, he contends that if the Complaint is not dismissed he "could" say he orally revoked the authority given to Aaron's to use automated communications, which if true, is a fact material to the claim that should have been alleged in the Complaint. Second, as to the emotional distress claim, he argues he does not have to allege facts showing the requisite injury because it is up to the trier of fact to decide whether or not Aaron's alleged conduct could cause emotional distress, which sidesteps the point that whether or not the conduct could have caused an injury is irrelevant if the Plaintiff cannot plead any facts showing that he was injured.

As to both claims, it is Plaintiff's apparent, but erroneous, belief that he need only recite the elements of the causes of action, and can figure out if there are facts and what facts to use later. This errant belief is contrary to the law. *See Nemet Chevrolet, Ltd.*, 591 F.3d at 255. Were there facts supporting the elements of the claims, Plaintiff was obligated to state them in the Complaint and would not need to speculate what facts not in the Complaint he might conjure. The Complaint should be dismissed because Plaintiff has abjectly failed to allege facts supporting each element of his causes of action and that would show the claims for relief are at least plausible.

A. **Plaintiff 's TCPA Claim Is a Conclusion Without Supporting Facts**

The core element of a TCPA claim is that calls or, in this case, texts were made using an "automated" dialer. Therefore, a sufficiently pled TCPA claim must include facts from which it is possible to ascertain that it is at least plausible that the messages were more likely sent via automated dialer than sent by human intervention. *See e.g., Gragg v. Orange Cabb Co., Inc.,* No. C12-0576RSL, 2013 U.S. Dist. LEXIS 7474, at *7 (W.D. Wash.). The Court's analysis in *Gragg*, provides guidance:

> Plaintiff alleges that he received an unsolicited text message, that he did not consent to receipt of the text message or the storage of his wireless number for marketing purposes, and that the message he received was sent by means of an ATDS [automated dialing system]. Based only on the allegations of the complaint, this last contention, while possible, does not appear plausible. Plaintiff does not disavow a business relationship with defendants, and he carefully avoids stating that he did not provide his wireless number to defendants, giving rise to the eminently reasonable inference that the text he received was a personal and individual response to a request for a taxi. Plaintiff's allegations regarding the frequency with which this message has been sent and the use of an ATDS to send them are unsupported by any specific facts and appear less likely than the alternate inference, namely that plaintiff received a customer-specific text (including an advertisement for Taxi Magic) through human agency, rather than an ATDS.

Id. Clayton does not disavow, and in fact, alleges that there was an ongoing debtor creditor relationship with Aaron's. Compl. ¶¶ 11, 12, 25, 27, 29, and 34. The Agreement between Clayton and Aaron's shows Clayton gave his cell number to Aaron's and clearly authorized Aaron's to make automated communications. *See,* Agreement, Exh. A to Mot. to Dismiss. Like the plaintiff in *Gragg*, Clayton has not provided any facts such as the content of any of the texts from which it might be ascertained whether or not the texts were automated, the telephone number from which the texts were sent, or the frequency of the texts. It is simply his conclusion that the texts were sent via an automated dialer. As in *Gragg*, Clayton's claim that the Aaron's communications were unauthorized is implausible, and he has offered no facts showing the communications were automated. Thus, he has failed to state a TCPA cause of action, and his claim must be dismissed with prejudice.

B. What Plaintiff "Could" Contend, But Did Not Allege in The Complaint, Does Not Make His TCPA Claim Plausible

The Agreement between Plaintiff and Aaron's is a necessary and relevant fact for determining whether Plaintiff has made a plausible claim for damages that can withstand a Rule 12(b)(6) motion. Although Plaintiff does not expressly mention the Agreement in his Complaint, it is implicated by Plaintiff's repeated allegations that there was a creditor/debtor relationship between the parties and that Aaron's alleged actions were to collect the debt. *See* Compl. ¶¶ 11, 12, 25, 27, 29, and 34. Plaintiff is alleging that Aaron's actions were not authorized by the creditor/debtor relationship, which is described in the lease agreement. As the Court noted in *Gragg*, the plausibility of the TCPA claim turns on whether there was a pre-existing relationship, which Clayton has pled existed, and the nature of that relationship. *Gragg*, No. C12-0576RSL, 2013 U.S. Dist. LEXIS 7474, at *7. So, the written terms of that relationship are within the scope of the Complaint.

Significantly, although Plaintiff is urging the Court not to consider the Agreement, Plaintiff is neither contesting the validity of the Agreement or that by signing it he authorized Aaron's to communicate with him via an automatic dialer. Instead, he is suggesting that if the Court considers the Agreement, he "could" contend he orally revoked the authority granted in the Agreement. (Opp. at 4). However, what matters is not Plaintiff's make it up as you go contention that he "could" say he orally revoked the Agreement, but what he did allege and whether or not what he did allege is sufficient, which it is not. He alleged that Aaron's actions were in furtherance of collecting a debt, which debt was governed by the Agreement that Clayton now acknowledges to exist and that at no point in the Complaint did he allege was orally revoked.

It is irrelevant that Clayton "could" say he revoked the agreement, and legally a contention that he orally revoked the written authorization has no foundation on either of the cases he cited in the Opposition. In *Moise v. Credit Control Svcs.*, No. 11-60026, 2011 U.S. Dist. LEXIS 120250 (S.D. Fla. Oct. 18, 2011), the issue of revocation is not even discussed. (Opp. at 4). The issue in *Moise* was whether consent provided to one creditor, a doctor, would then transfer to an affiliated creditor, Quest Diagnostics. *Moise*, 2011 U.S. Dist. LEXIS 120250, at *4-5. Whether consent can transfer between creditors is not at issue here. In *Gutierrez v. Barclay's Group*, No. 10cv1012, 2011 U.S. Dist. LEXIS 12546 (S.D. Cal. Feb. 9, 2011), the court found that a husband could not give consent on behalf of his wife, and that the wife could orally revoke an invalidly given consent. *Gutierrez*, 2011 U.S. Dist. LEXIS 12546, at *7-12. (Opp. at 4). Neither case is relevant to Clayton's claim.

Clayton argues that the existence of the Agreement creates questions of fact begging discovery and therefore his claim must not be dismissed. But, there is no need for Clayton to have discovery of the Agreement because he acknowledges its existence, and the terms of the Agreement are clear:

> By providing my telephone number(s), including any cellular number(s), I consent to receiving calls (both live and automated) from Aaron's regarding my agreement(s).

Agreement at 1, "Release of Information to Aaron's." Certainly Clayton cannot be arguing that he needs discovery to decide whether or not he orally revoked the written agreement. Either he believes he did or he knows that he did not. Either way, he did not plead that he orally revoked it, so discovery on that point is not necessary.

Plaintiff's contention that maybe he will contend that he orally revoked the Agreement simply cannot rescue his claim, which lacks the facts necessary to have stated a TCPA cause of action and that is not plausible. Therefore, his TCPA claim must be dismissed with prejudice.

II. PLAINTIFF'S CONCLUSORY ALLEGATIONS ARE INSUFFICIENT TO SUPPORT A CLAIM FOR INTENTIONAL OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Plaintiff cites no cases supporting his argument that his woefully insufficient factual allegations state a cause of action for emotional distress. Contrary to Plaintiff's unsupported assertion that the elements of his claims may only be determined by a "trier of fact," (Opp. at 6), courts routinely dismiss infliction of emotional distress claims for failure to plead sufficiently. *See e.g.*, *Harris v. Kreutzer*, 271 Va. 188, 204; 624 S.E.2d 24, 33 (Va. 2006) (dismissing plaintiff's intentional infliction of emotional distress claim for failure to allege sufficient facts); *Russo v. White*, 241 Va. 23, 28; 400 S.E. 2d 160, 163 (Va. 1991) (dismissing plaintiff's claim for intentional infliction of emotional distress for insufficient pleading regarding injury); *Henderson v. Labor Finders of Va.*, No. 3:12cv600, 2013 U.S. Dist. LEXIS 47753 (E.D. Va. April 2, 2013) (dismissing claim for intentional infliction of emotional distress for failing to allege sufficient facts regarding injury); *Hales v. City of Newport News*, No. 4:11cv28, 2011 U.S. Dist. LEXIS 112714 (E.D. Va. Sept. 30, 2011) (dismissing claim for intentional infliction of emotional distress for failing to allege sufficient facts regarding defendant's conduct and plaintiff's injury); *Nigro v. Va. Commonwealth Univ. Medical College of Va.*, 5:09-CV-00064, 2010 U.S. Dist. LEXIS 56229 (W.D. Va. June 4, 2010) (dismissing plaintiff's intentional infliction of emotional distress claim for insufficient allegations); *Robertson v. Prince William Hosp.*, 1:11-cv-820, 2012 U.S. Dist. LEXIS 58752 (E.D. Va. April 25, 2012) (dismissing plaintiff's claim for negligent infliction of emotional distress for failure to state a claim); *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125; 523 S.E.2d 826 (Va. 2000) (dismissing claim for negligent infliction of emotional distress for failing to plead injury with the requisite specificity).

Without providing any facts such as the content of the texts or the frequency of the texts, Plaintiff would like the Court to find that Aaron's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" because he says that is the case. *Russo*, 241 Va. at 27, 400 S.E.2d at 162. However, the case law authority clearly requires a Court to look at the facts alleged in the complaint "…to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery." *Harris*, 271 Va. at 204; 624 S.E.2d at 34 (citing *Womack v Eldridge*, 215 Va. 338, 342; 210 S.E.2d 145, 148 (1974)). Allegations that Aaron's sent him text messages that bothered him are simply not enough. *See, id.* (no outrageous conduct where plaintiff alleged defendant "verbally abused her, raised his voice to her, caused her to break down into tears"); *Hales*, 2011 U.S. Dist. LEXIS 112714, at *18 (allegations that plaintiff was arrested, handcuffed, and placed in police car and officer ignored pleas to loosen handcuffs not sufficient to show outrageous conduct); *Nigro*, 2010 U.S. Dist. LEXIS 56229, at *45 (allegations of defamatory statements, refusal to provide counseling, threats of termination and accusations of criminal activity do not constitute outrageous conduct).

Nor do Plaintiff's conclusory allegations that he "suffered emotional distress resulting in his feeling stressed, frustrated, and angered, amongst other negative emotions" (Compl. ¶ 17) meet the requirements for pleading negligent infliction of emotional distress, which requires pleading “with specificity” that the plaintiff “incurred a physical injury which was the natural result of fright or shock proximately caused by the defendants’ alleged negligence.” *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 138, 523 S.E.2d 826, 834 (2000). Nowhere in his complaint does the Plaintiff allege that he suffered any physical injury – he alleges only “negative emotions.” Additionally, Plaintiff has not alleged “a legal duty, a violation of the duty, and a consequent injury” by Aaron’s as required for an action for negligent infliction of emotional distress. *Robertson,* 2012 U.S. Dist. LEXIS 58752, at *16 (citing *Villnow v. DeAngelis*, 55 Va. Cir. 324, 325 (Va. Cir. Ct. 2001)).

Similarly, Plaintiff’s allegations do not demonstrate the he suffered the type of “severe” distress necessary to support his claim for intentional infliction of emotional distress. *Russo*, 241 Va. at 27; 400 S.E. 2d at 162. Like the plaintiff in *Russo*, Clayton has not alleged “that [he] had any objective physical injury caused by the stress, that [he] sought medical attention, that [he] was confined at home or in a hospital, or that [he] lost income.” *Id*. at 28; 163. Mere “conclusory allegations that there was injury to … his peace of mind” is simply not enough. *Henderson*, 2013 U.S. Dist. LEXIS 47753, at * 31-32.

Accordingly, Plaintiff’s allegations are insufficient to support a claim for intentional or negligent infliction of emotional distress and his claim for infliction of emotional distress must be dismissed with prejudice.

III. PLAINTIFF’S REQUEST TO AMEND HIS COMPLAINT SHOULD BE DENIED

“[A] district court has discretion to deny a motion to amend a complaint, so long as it does not outright refuse ‘to grant the leave without any justifying reason.’” *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). “A district court may deny a motion to amend when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the amendment would be futile." *Id*. (citing *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc)). "In determining whether a proposed amendment is futile, a court may consider whether the proposed amendments could withstand a motion to dismiss." *Smith v. Purnell*, 1:11cv922, 2011 U.S. Dist. LEXIS 141738, at *11 (E.D. Va. Dec. 9, 2011) (citing *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (affirming denial of plaintiff's motion for leave to amend her complaint as futile because "the proposed amendments could not withstand a motion to dismiss."); 6 Charles Alan Wright, et al., Federal Practice and Procedure § 1487, at 743 n.28 (2010)).

Plaintiff offers no facts or law supporting his request for leave to amend the Complaint, and has not provided the Court with any notion of what new facts he would allege that would enable an amended Complaint to withstand a Rule 12(b)(6) motion. This is not surprising given the central issue and fact in the case is the immutable existence of the written authorization Plaintiff gave to Aaron's to communicate with him through automated dialing. Given that Plaintiff has refused, even in his Opposition, to unequivocally state that he did orally revoke the written authorization, and the fact that there is no law to support the validity of any such oral revocation, amending the Complaint would be futile. Thus, Plaintiff's request for leave to amend his Complaint should be denied. *See, e.g., Keck v. Commonwealth*, No. 3:10cv555, 2011 U.S. Dist. LEXIS 74635, at *6 (E.D. Va. July 12, 2011) (denying plaintiff's motion to amend where plaintiff provided an incomplete description of planned amendments and failed to tender proposed amendments to the court).

CONCLUSION

Accordingly, for the reasons set forth above, Aaron's Motion to Dismiss under Rule 12(b)(6) should be granted and Plaintiff's Complaint should be dismissed, with prejudice, because Plaintiff has failed to state a claim upon which relief can be granted.

May 28, 2013

Respectfully submitted,

/s/ John M. Murdock
John M. Murdock (VA Bar No. 26647)
BENTON POTTER & MURDOCK, P.C.
400 S. Maple Avenue, Suite 210
Falls Church, Virginia 22046
Tel: 703-992-9255
Fax: 703-832-0241
Email: jm@bpmlawyers.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 28th day of May, 2013, the foregoing document was filed through the Court's CM/ECF system that automatically generates service on counsel appearing in this case.

Richard W. Ferris
FERRISWINDER, PLLC
530 East Main Street, Suite 710
Richmond, VA 23219
rwferris@ferriswinder.com
Counsel for Plaintiff

___/s/ John M. Murdock____
John M. Murdock